6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R05-OAR-2018-0634; FRL-10012-07-Region 5]

Air Plan Approval; Indiana; Revisions to NO_X SIP Call and CAIR Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving under the Clean Air Act (CAA) a request from the Indiana Department of Environmental Management (IDEM) to revise the Indiana State Implementation Plan (SIP) to incorporate the following: a new rule concerning nitrogen oxide (NO_X) emissions for the ozone season from Electric Generating Units (EGUs) and large non-EGUs; revisions concerning NO_X emission rate limits for specific source categories; the repeal of the NO_X Budget Trading Program; and the repeal of the Clean Air Interstate Rule (CAIR) NO_X ozone season trading program. This SIP revision will ensure continued compliance by EGUs and large non-EGUs with the requirements of the NO_X SIP Call.

DATES: This final rule is effective on **[insert date 30 days after date of publication in the Federal Register].**

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R05-OAR-2018-0634. All documents in the

docket are listed on the www.regulations.gov web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through www.regulations.gov or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID 19. We recommend that you telephone Eric Svingen, Environmental Engineer, at (312) 353-4489 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Eric Svingen, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR-18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353-4489, svingen.eric@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA.

I. What is the background for this final rule?

Under the "good neighbor provision" of CAA section 110(a)(2)(D)(i)(I), states are required to eliminate their

significant contributions to air quality problems in downwind states. To address the good neighbor provision for progressively more protective National Ambient Air Quality Standards (NAAQS) for ozone and fine particulate matter ($PM_{2.5}$), EPA published a series of regulations requiring eastern states, including Indiana, to comply with statewide budgets limiting ozone season emissions of NO_X, a precursor to ozone, as well as annual emissions of NO_X and sulfur dioxide (SO_2), precursors to $PM_{2.5}$.

On October 27, 1998, EPA published the NO_X SIP Call, which addressed the good neighbor provision for the 1979 ozone NAAQS by requiring eastern states to submit SIPs complying with statewide budgets for ozone season NO_X emissions (63 FR 57356). The NO_X SIP Call also established the NO_X Budget Trading Program, an allowance trading program that states could adopt to meet most of their obligations under the NO_X SIP Call. On May 12, 2005, EPA published CAIR, which addressed the good neighbor provision for the 1997 ozone NAAQS and 1997 $PM_{2.5}$ NAAQS by requiring eastern states to submit SIPs complying with statewide budgets for ozone season NO_X emissions and annual NO_X and SO_2 emissions (70 FR 25152). CAIR also established allowance trading programs that states could adopt to meet their obligations. Upon implementation of the CAIR trading program for ozone season NO_X in 2009, EPA discontinued administration of

the NO_X Budget Trading Program. Both the NO_X SIP Call and CAIR allowed certain sources to participate in the trading programs: EGUs with capacity greater than 25 megawatts; and large non-EGUs, such as boilers and combustion turbines, with a rated heat input greater than 250 million British thermal units (MMBtu) per hour.

To meet the requirements of the NO_X SIP Call, IDEM promulgated rules at 326 IAC 10-3 and 326 IAC 10-4, and to meet the requirements of CAIR, IDEM promulgated rules at 326 IAC 24-1, 326 IAC 24-2, and 326 IAC 24-3. EPA approved the original versions of Indiana's NO_X SIP Call rules and CAIR rules into the SIP on November 8, 2001 (66 FR 56465) and October 22, 2007 (72 FR 59480), respectively; EPA most recently approved revised versions of these rules on November 29, 2010 (75 FR 72956).

On August 8, 2011, EPA published the Cross-State Air Pollution Rule (CSAPR), which replaced CAIR and addressed the good neighbor provision for the 1997 ozone NAAQS, 1997 $PM_{2.5}$ NAAQS, and 2006 $PM_{2.5}$ NAAQS by establishing new statewide budgets in eastern states for ozone season NO_X emissions and annual NO_X and SO_2 emissions (76 FR 48208). Participation by a state's EGUs in the CSAPR trading program for ozone season NO_X generally addressed NO_X SIP Call obligations for EGUs. However, CSAPR did not initially contain provisions allowing states to incorporate

large non-EGUs into that trading program to meet the ongoing requirements of the NO_X SIP Call for non-EGUs.

Most recently, on October 26, 2016, EPA published the CSAPR Update, which addressed the good neighbor provision for the 2008 ozone NAAQS by establishing new statewide budgets in eastern states for ozone season NO_X emissions (81 FR 74504). The CSAPR Update also expanded options available to states for meeting NO_X SIP Call requirements for large non-EGUs.

After evaluating the various options available following promulgation of the CSAPR Update, IDEM chose to meet NO_X SIP Call requirements for large non-EGUs by adopting a new rule at 326 IAC 10-2 and revising its rule at 326 IAC 10-3. The new rule at 326 IAC 10-2 makes the portion of the state's NO_X SIP Call budget assigned to non-EGUs enforceable without an allowance trading mechanism, and the revised rule at 326 IAC 10-3 provides source-by-source emission rate limits for certain blast furnace gas-fired units formerly regulated under the NO_X Budget Trading Program. IDEM also repealed its CAIR rules at 326 IAC 24-1, 326 IAC 24-2, and 326 IAC 24-3 and its NO_X Budget Trading Program rule at 326 IAC 10-4. In its August 27, 2018 submission, IDEM requested that EPA approve these changes into the Indiana SIP.

On December 17, 2018 (83 FR 64472), EPA approved a separate November 27, 2017 submission from IDEM, which removed 326 IAC 24-1, 326 IAC 24-2, and portions of 326 IAC 24-3 from the

Indiana SIP. Following the December 17, 2018 SIP action, portions of 326 IAC 24-3 are the only part of Indiana's CAIR rules that remain in the Indiana SIP.

On February 21, 2020 (85 FR 10064), EPA published a direct final rule approving Indiana's request to modify its SIP to include the new rule at 326 IAC 10-2 and the revised rule at 326 IAC 10-3 and to remove 326 IAC 10-4 and 326 IAC 24-3. The direct final rule contains a detailed analysis of Indiana's submittal. In the direct final rule, EPA stated that if adverse comments were received by March 23, 2020, the rule would be withdrawn and would not take effect. EPA received adverse comments prior to the close of the comment period; therefore, EPA published a withdrawal of the direct final rule on April 10, 2020 (85 FR 20165). EPA is addressing the adverse comments in this final action, based upon the proposed action also published on February 21, 2020 (85 FR 10127).

II. What are EPA's responses to comments?

During the comment period, EPA received three comments, all of which are available in the docket for this action. A summary of these comments, and EPA's response, is provided below.

Comment: A commenter refers to a court case involving Monsanto. Without further clarifying the source at issue, the commenter alleges that these rule revisions would allow an increase in NO_X emissions at "the plant". The commenter raises

concerns that hearings have been closed to the public and asserts that approving IDEM's revisions would violate the CAA by increasing EPA's regulatory authority.

Response: The commenter's objection does not appear to be relevant to EPA's approval of Indiana's SIP submission and is therefore outside of the scope of this action. According to a list of affected sources provided by IDEM, these rule revisions would not modify any requirements for any Monsanto facility. Further, as discussed in EPA's direct final rule, the majority of these revisions either add new requirements, remove provisions that have no impact on emissions, or replace existing requirements under one rule with identical requirements under another rule. For two sources, ArcelorMittal Indiana Harbor East and US Steel Gary Works, these revisions modify emissions monitoring requirements, but the revisions are not expected to cause a change in emissions levels. The commenter did not raise any specific objections to EPA's conclusion that IDEM's revisions will not result in increased NO_X emissions from affected sources. Finally, EPA notes that the commenter did not explain why these revisions might increase EPA's regulatory authority and did not explain how any hearings were closed to the public. In fact, there was no public hearing associated with the comment period for this rulemaking.

Comment: A commenter states that "EPA's illegal approval of these revisions is hampered by the Court's decision in Wisconsin v EPA and New York v EPA." The commenter alleges that these cases require EPA to consider the environmental impacts of its decisions. The commenter writes that "EPA's only primary consideration should be whether the decision will reduce adverse impacts on human health or the environment, not whether it will increase economic growth or stave off any harm to the environment."

Response: The decisions apparently referenced by this commenter, *Wisconsin v. EPA*, 938 F.3d 303 (2019) and *New York v. EPA*, 781 Fed. App'x 4 (2019), both involve challenges to the CSAPR Update. In *Wisconsin*, the D.C. Circuit considered consolidated challenges from environmental petitioners, who argued that the rule was too lenient, as well as state and industry petitioners, who argued that the rule was too strict. The court's *Wisconsin* decision upheld the CSAPR Update in most respects but found that the rule improperly allows upwind states to continue their significant contributions to downwind air quality problems beyond attainment dates provided under the CAA. 938 F.3d at 312-20. On this issue, the court remanded CSAPR Update to EPA. *Id.* at 336. In *New York*, the D.C. Circuit considered a parallel challenge to EPA's CSAPR Close-Out, published December 21, 2018 (83 FR 65878). In the Close-Out,

EPA determined that CSAPR Update fully addressed eastern states' obligations under the good neighbor provision for the 2008 ozone NAAQS. However, consistent with the *Wisconsin* court's holding that EPA had not properly considered the CAA attainment dates, the court in *New York* vacated the Close-Out. 781 Fed. App'x at 6-7.

The commenter does not explain how the decisions in *Wisconsin* or *New York* would prevent EPA from approving IDEM's revisions. Aside from its holding that EPA must adhere to the attainment dates when addressing good neighbor obligations under the 2008 ozone NAAQS, the D.C. Circuit in *Wisconsin* otherwise found "that EPA acted lawfully and rationally" in promulgating the CSAPR Update. 938 F.3d at 309. In particular, the court in *Wisconsin* upheld EPA's analysis of appropriate cost-control levels for emissions reductions, which was the primary economic issue considered by the court. *Id.* at 322-23. The court's remand of the CSAPR Update was focused solely on EPA's obligation to implement emission reductions consistent with the attainment dates associated with the 2008 ozone NAAQS. The *Wisconsin* and *New York* decisions have no impact on EPA's evaluation of NO_X SIP Call requirements pertaining to the 1979 ozone NAAQS, or CAIR requirements pertaining to the 1997 ozone NAAQS and 1997 $PM_{2.5}$ NAAQS, which are the requirements being addressed under these rule revisions. In the February 21, 2020

direct final rule, EPA appropriately addressed the environmental impacts of these revisions and determined that the SIP revisions would not result in a change to NO_X emissions from Indiana EGUs or large non-EGUs.

Comment: A commenter alleges that "EPA can't approve these revisions because the Court vacated CSAPR Update in the Wisconsin case leaving EPA with a gaping regulatory hole." The commenter further asserts that the court's vacatur upended the reporting and testing requirements in the NO_X SIP call rule. The commenter therefore contends that EPA cannot approve IDEM's revisions until EPA replaces the CSAPR Update and "fixes the Wisconsin v EPA and New York v EPA vacatures."

Response: This commenter also apparently references *Wisconsin v. EPA*, 938 F.3d 303 (2019) and *New York v. EPA*, 781 Fed. App'x 4 (2019). In *Wisconsin*, the D.C. Circuit rejected arguments that the CSAPR Update should be vacated, holding that "as a general rule, we do not vacate regulations when doing so would risk significant harm to the public health or the environment." 938 F.3d at 336. Because the CSAPR Update remains in place, there is no "regulatory hole" that EPA must address before IDEM's revisions can be approved. Further, the vacatur in *New York* involves only EPA's finding in the Close-Out that the CSAPR Update resolves upwind states' obligations under the good neighbor provision for the 2008 ozone NAAQS.

Following EPA's approval of these revisions into the Indiana SIP, large non-EGUs will satisfy their ongoing obligations under the NO_X SIP Call in a manner that does not rely on the CSAPR trading programs. IDEM continues to satisfy its obligations under the NO_X SIP Call as to EGUs through participation in the CSAPR trading programs. Neither the *Wisconsin* remand nor the *New York* vacatur affect EPA's finding in the CSAPR Update that "compliance with the budgets established under the CSAPR Update would satisfy the requirements of the NO_X SIP Call" for EGUs (81 FR 74504 at 74571), nor have any of the monitoring and reporting requirements of the CSAPR Update been affected. Therefore, the decisions in *Wisconsin* or *New York* have not created any "regulatory hole" for either EGUs or large non-EGUs which would prevent EPA from approving these rule revisions.

III. What Action is EPA Taking?

EPA is approving IDEM's request to modify its SIP to include the new rule at 326 IAC 10-2 and the revised rule at 326 IAC 10-3 and to remove 326 IAC 10-4 and 326 IAC 24-3.

IV. Incorporation by Reference.

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the Indiana Regulations described in the

amendments to 40 CFR part 52 set forth below. EPA has made, and will continue to make, these documents generally available through www.regulations.gov, and at the EPA Region 5 Office (please contact the person identified in the "For Further Information Contact" section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

Also in this document, as described in the amendments to 40 CFR part 52 set forth below, EPA is removing provisions of the EPA-Approved Indiana Regulations from the Indiana SIP, which is incorporated by reference in accordance with the requirements of 1 CFR part 51.

V. Statutory and Executive Order Reviews.

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to

[1] 62 FR 27968 (May 22, 1997).

approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect,

the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: July 9, 2020.

Kurt Thiede,
Regional Administrator, Region 5.

For the reasons states in the preamble, the EPA amends 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

2. In § 52.770, the table in paragraph (c) is amended by:

a. Revising the section entitled "Article 10. Nitrogen Oxides Rules"; and

b. Removing the heading "Rule 3. Clean Air Interstate Rule (CAIR) NO_X Ozone Season Trading Program" and the entries for "24-3-1", "24-3-2", "24-3-4", and "24-3-11".

The revision reads as follows:

§ 52.770 Identification of plan.

* * * * *

(c) * * *

EPA--APPROVED INDIANA REGULATIONS

Indiana Citation	Subject	Indiana Effective Date	EPA approval date	Comments
* * * * * * *				
Article 10. Nitrogen Oxides Rules				
10-1	Nitrogen Oxides Control in Clark and Floyd Counties	6/12/1996	6/3/1997, 62 FR 30253	
10-2	NOx Emissions from Large Affected Units	8/26/2018	**[insert date of publication in the Federal Register], [Insert Federal Register citation]**	

10-3	Nitrogen Oxide Reduction Program for Specific Source Categories	8/26/2018	**[insert date of publication in the Federal Register], [Insert Federal Register citation]**	
10-5	Nitrogen Oxide Reduction Program for Internal Combustion Engines (ICE)	2/26/2006	10/1/2007, 72 FR 55664	
10-6	Nitrogen Oxides Emission Limitations for Southern Indiana Gas and Electric Company	8/30/2008	11/10/2009, 74 FR 57904	
* * * * * * *				

* * * * *

[FR Doc. 2020-15220 Filed: 7/23/2020 8:45 am; Publication Date: 7/24/2020]